IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-5806

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SUPREME COURT, U.S.

JOHN NEWMAN, Petitioner

VERSUS

C. MURRAY HENDERSON, Warden
Louisiana State Penitentiary

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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Petitioner, John Newman, seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit. That judgment reversed a district court decision, that had set aside petitioner's state conviction and sentence for aggravated rape.

OPINIONS BELOW

The opinion of the court of appeals is reported at 496 F.2d 896 and appears at Appendix A, infra, pp. 1a-7a. The opinion of the district court is unreported and appears at Appendix B, infra, pp.8a-16a.

JURISDICTION

The jurisdiction of this court to review by writ of certiorari the judgment of the court of appeals is invoked under 28 U.S.C. §1254(1). The original opinion and judgment of the court of appeals were rendered on June 28, 1974. A timely application for rehearing and rehearing en banc was denied

on October 7, 1974. 502 F.2d 1167. (Appendix C). This petition for certiorari is filed within 90 days of that date. 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

A state prisoner, found guilty after trial, alleges for the first time in state habeas proceedings a jury exclusion claim. The state courts, acting under a plenary habeas statute, neither discuss nor rely upon the petitioner's failure to raise the claim at trial but rather reach and decide the merits adversely to petitioner. In federal district court the state neither alleges nor seeks to prove a bypass of state remedies or a waiver of the jury issue but submits the claim on its merits. The district court finds favorably to petitioner. The court of appeals reverses holding the claim barred by a state rule of procedure that requires such claims to be raised before trial. The question presented is as follows:

Is a state rule of procedure that purports, under penalty of forfeiture, to require the presentation of a jury discrimination claim prior to trial a bar to federal habeas relief, on behalf of a petitioner who was convicted after trial, where

A. The state courts gave no effect to their rule in considering a jury exclusion claim raised for the first time in post-conviction proceedings but instead held themselves open to petitioner's constitutional claim and reached and passed upon the merits; and

B. There is no evidence that the petitioner deliberately bypassed orderly state procedures or knowingly and intelligently waived his right to challenge the jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1

". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . ."

Louisiana Revised Statutes, Title 15, Section 202(repealed):

> "All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against an array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."

STATEMENT OF THE CASE

In October 1962 John Newman, a black man, was indicted for aggravated rape by a grand jury; in April 1964 he was found guilty by a petit jury and was sentenced to life imprisonment. At his trial Newman's attorney made no objection to the jury system.

In 1970 Newman filed a petition for habeas corpus in state court alleging that the grand and petit juries had been constituted in a racially discriminatory fashion. The State made no allegation that the jury issue had been waived in fact or was foreclosed in law. Similarly the state habeas judge made no finding that the issue was waived or foreclosed. Instead the state court reached, considered, and decided Newman's jury claims on their merits, issuing a lengthy and thorough written opinion adverse to Newman. (Appendix D). Newman then renewed his petition in the Louisiana Supreme Court. Again the State did not urge a waiver or forfeiture argument. The supreme court left the lower court's ruling undisturbed. (Appendix E).

On April 27, 1971 Newman filed for federal habeas corpus. In October 1971 a United States magistrate ordered the state to set forth any reasons why an evidentiary hearing should not be held. The State offered none. In September 1972 the magistrate ordered the State to show cause why habeas corpus relief should not be granted. In response the State made no mention of waiver or forfeiture but relying only on the merits recited that it "concurs in and adopts the reasons stated by the [state habeas] trial judge" in his written opinion[1] On June 21, 1973 the district court ordered Newman's conviction and

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1 Newman v Henderson, (No. 71-1164, E.D.La); Response to Order to Show Cause, filed October 3, 1972.

sentence set aside on the ground that the jury system had been discriminatory.

The State appealed to the Fifth Circuit. Relying on LSA - R.S. 15:202, supra, p. 3,[2] the State argued for the first time that Newman had forfeited his right to urge the jury issue by his failure to follow that rule and to object to the juries prior to trial. The court of appeals agreed and relying on Davis v United States, 411 U.S. 233 (1973), held that the State's forfeiture rule must be strictly regarded. In doing so the court rejected both the argument that the question of waiver was controlled by Fay v Noia, 372 U.S. 391 (1963) and the argument that there was in any event no state waiver since the state courts had considered the issue open on habeas.[3,4] From the judgment of the court of appeals Newman now seeks certiorari.

REASONS FOR GRANTING WRIT

On April 17, 1973 this Court decided both Tollett v Henderson, 411 U.S. 258 and Davis v United States, 411 U.S. 233. The instant case presents the issues left open and uncertain by those two opinions and shows the need and importance of their resolution by this Court.

In Davis, supra, relying on Rule 12(b)(2), F.R.Cr.P., the Court held that a federal prisoner who had failed to plead a jury exclusion claim prior to trial was barred from raising such claims on habeas corpus absent his showing cause for his failure to object prior to trial. The Court rejected the argument based on Fay v Noia, 372 U.S. 391 (1963), that the claim should be

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2 This statute was in effect at the time of Newman's indictment and trial; it has since been repealed and replaced by LSA - C.Cr.P., Article 535.

3 Although the Fifth Circuit opinion fails to discuss the fact that the waiver had not been enforced in the state courts, this issue was both thoroughly briefed and argued in the court of appeals. (5th Cir. No. 73-3393, Brief of Appellant, pp. 10-14)

4 The instant case was heard and decided below with Francis v Henderson, (5th Cir. No. 73-3670). In Francis, unlike Newman, the State did make a waiver argument, and facts relating thereto were accordingly developed, prior to the appeal in the Circuit. The opinion, therefore, as to Francis deals with the facts as to Francis' "waiver," facts which there had never been any need to develop as to Newman.

available absent a showing of a deliberate bypass or a knowing waiver. At the same time the Court made no pretense of overruling Fay v Noia, and in fact merely reaffirmed a principle first enunciated in Shotwell Mfg. Co. v United States, 371 U.S. 341 (1963), decided in the same term with Fay v Noia, and that for ten years had stood side by side with Fay v Noia.

Simultaneously, in Tollett v Henderson, supra, the Court held that a state prisoner who had plead guilty was almost totally barred from raising a jury exclusion claim on federal habeas. The Court's rationale, however, was based not on concept of waiver or forfeiture but on the independent theory of the guilty-plea cases.[5] That theory had no relevance to the case of a state prisoner who had been found guilty after trial. The Court noted the limits of its decisions in both Tollett and Davis when, referring to state prisoners who had failed to follow rules similar to Rule 12(b)(2)[6] it stated that

> ". . . the issue of whether grand jury exclusion might be raised after a plea of not guilty and trial by jury is left open by this opinion as it was by Parker [v North Carolina, 397 U.S. 790,798 (1970)]"
>
> 411 U.S. at 260, n.1.

That issue is now presented by this case.

In the quoted language from Tollett, the Court implicitly recognized as it had earlier in Parker v North Carolina, supra at 798, that the Fourth and Fifth Circuit Courts of Appeals, the ones most concerned with jury exclusion claims, had already resolved the issue. In opinions deeply rooted in Fay v Noia, both Circuits had held that federal habeas would be available to state prisoners who had failed to raise a jury issue prior to trial unless the state proved that the prisoner had intentionally waived a known right or made a strategic by-pass of state procedures. Labat v Bennett, 365 F.2d 698 (5th Cir.

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5 Brady v United States, 397 U.S. 742 (1970); McMann v Richardson, 397 U.S. 759 (1970); and Parker v North Carolina, 397 U.S. 790 (1970).

6 That the reference is to state prisoners who failed to follow state rules is clear. Referring to the original language in Parker, supra, the Court in Davis stated:

> "The context . . . makes it apparent that the question was framed in terms of waiver and timely assertion of such a claim in state criminal proceedings."
>
> 411 U.S. at 242.

1966)(en banc), cert. den., 386 U.S. 991 (1967)[7]; McNeil v North Carolina, 368 F.2d 313 (4th Cir. 1966). At the time of Tollett and Davis, both cases were the controlling precedents for state prisoners in the two circuits. Nothing in either Davis or Tollett directly attacked their validity or that of their foundation, Fay v Noia.

The Fifth Circuit, however, in the wake of Davis, apparently concluded that Labat v Bennett, supra, and presumably Fay v Noia also,have been overruled. In a series of brief and unreasoned per curia antedating the instant case, the Fifth Circuit abandoned the standard of Fay v Noia and tested petitions such as the instant one by the standard of Rule 12(b)(2), F.R.Cr.P. as expressed in Davis.[8] It did this notwithstanding the fact that Davis itself had merely reaffirmed a Fifth Circuit opinion, 455 F.2d 919, that had coexisted with Labat, supra, and its offspring. Presented in the instant case with the State's belated waiver argument the Fifth Circuit reiterated its position,again without explicit reasons.

Petitioner here submits first that because the state courts have never held his jury claims to be "waived," the language of LSA - R.S. 15:202 notwithstanding, there simply was no occasion for the Fifth Circuit even to consider the"waiver"question; second, that if indeed "waiver" be an issue then the standard is that of Fay v Noia, not that of Davis, and that the apparent inconsistency between the two decisions at a minimum requires thoughtful and careful consideration by this Court.

The Courts of Appeals for the Fourth and Sixth Circuits have taken an approach in conflict with that of the Fifth Circuit and in accord with that of petitioner. The Fourth Circuit has considered the issues raised by Davis and Tollett en banc. Hairston v Cox, 500 F.2d 584 (1974). The course of the Hairston litigation was virtually identical to that here. Hairston was convicted after trial in state court and did not at that time raise a jury exclusion issue. Subsequently he raised the claim in state post-conviction proceedings. Notwithstanding a Virginia "waiver" provision almost identical to

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7 Labat v Bennett, supra, involved the same LSA - R.S. 15:202 involved here.

8 Rivera v Wainwright, 488 F.2d 275 (5th Cir. 1974); Marlin v Florida, 489 F.2d 702; Jones v Henderson, 494 F.2d 47 (5th Cir. 1974).

Rule 12(b)(2) and to LSA - R.S. 15:202, the Virginia courts considered the merits of Hairstor's claim. Before the Fourth Circuit, en banc, the State argued the "waiver" provision and urged that Davis controlled. The Fourth Circuit held that there was no need to reach the question whether Davis undermined Fay v Noia and McNeil v North Carolina, supra, instead finding that:

> " . . . the state habeas court had considered the merits of Hairston's allegations and that it had not relied on the waiver mandated by the Virginia statute which dealt with challenges to juries at the time of Hairston's trial. In this posture of the case, the constitutionality of the composition of the jury is before us as a litigable issue. Cf. Coleman v Alabama, 377 U.S. 129 (1964)"
>
> 500 F.2d at 586.

The court affirmed the grant of habeas relief.

The Sixth Circuit followed an identical course in Hale v Henderson, 485 F.2d 266 (1973). There Hale raised his jury exclusion claim for the first time in state post-conviction proceedings. The Tennessee courts considered the case on its merits. The Sixth Circuit then rejected the State's "waiver" argument based on Davis:

> "We do not think we can properly dispose of this issue under the rationale of the recent decision in Davis v United States. Here the Tennessee Supreme Court passed on the appellant's federal constitutional contention as to the grand jury foreman on the merits. In this situation settled case law holds that the federal courts will likewise reach the merits. Warden v Hayden, 387 U.S. 294, 297 n. 3; Irvin v Dowd, 359 U.S. 394, 406 (1959); Brown v Allen, 344 U.S. 443, 486 (1953); Herndon v Lowry, 301 U.S. 242, 247 (1937)"
>
> 485 F.2d at 269.

The Fifth Circuit's application here of a "waiver" theory in a case in which the State courts had held no waiver and had reached and determined the federal constitutional questions directly conflicts with the decisions of the Fourth and Sixth Circuits in Hale v Henderson, supra, and Hairston v Cox, supra. It further flies in the face of this Court's repeated holdings that if a State is willing to consider a federal question, notwithstanding a procedural default, then the federal courts will review the question. See cases cited in Hale v Henderson, supra, and Hairston v Cox, supra.

The whole issue of "waiver," analyzed in Fay v Noia and Davis, arises out of an attempt to balance the interest of a trial jurisdiction in finality and order and the ultimate interest in a perfect scheme of justice. Cf., Fay v Noia, supra at 426-435. Where as here, as in Hairston and Hale, and as in this Court's cases cited above, the state courts professed themselves willing to forego their interest in finality if a constitutional defect existed the rationale for a federal court importing a "waiver" theory vanishes.

The error of the decision here is underscored by the Fifth Circuit's facile assumption that former LSA - R.S. 15:202 is the absolute waiver provision it purports to be. In 1966 Louisiana enacted a liberalized habeas statute providing relief whenever there was a violation of due process. LSA - C.Cr.P., Art. 362(9). In a recent opinion, rendered six months after Davis, the Louisiana Supreme Court interpreted this article as keeping open on state habeas all federal constitutional issues absent proof of an intentional bypass. Barrabino v Henderson, 283 So.2d 764 (1973). Thus the circuit court is in the unseemly position of having denied federal relief on the ground of a state "waiver" rule which the State courts chose not to apply and which may not even exist.[9]

In the event this Court should decide that the waiver issue presented by the State is,under the circumstances,a valid one for the federal courts to consider then arises the underlying question, reserved in Davis and Tollett, and decided by the Fifth Circuit here: whether the effectiveness of the purported waiver is to be judged by the standards of Fay v Noia or by those of Davis. Again the Fifth Circuit is in conflict with the courts of the Fourth Circuit. Two district courts in the Fourth Circuit have already rejected the view that Davis overrules Fay v Noia and have continued to test purported waivers by the standard of Fay v Noia and of McNeil v North Carolina, supra. Guzewicz v Slayton, 366 F.Supp. 1402 (E.D.Va. 1973); Hairston v Cox, 361 F.Supp. 1180 (W.D.Va. 1973). Both courts thoroughly canvassed the federal policies underlying Fay v Noia and the special reasons for according state prisoners an open door to federal court. Neither court was willing to accept

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9 Though not discussed in the opinion, this issue was raised before the court of appeals. See n.3, supra, p. 4.

the contention that this court in Davis had sub silentio overruled Fay v Noia. Hairston v Cox, supra, of course was subsequently affirmed en banc without reaching the ultimate issue. Hairston v Cox, 500 F.2d 584 (1974). Interestingly, however, prior to the en banc consideration, a panel of the Fourth Circuit affirmed the district court on the district court opinion. See, Hairston v Cox, 500 F.2d at 585 n.3. The view of at least some members of the Fourth Circuit is clear.

The Fourth and Fifth circuits are in conflict on the principal issues involved in this case. Both circuits have in the past handled numerous jury exclusion cases and will continue to do so in the future. Prior to Tollett and Davis both courts had evolved essentially identical rules, rooted in Fay v Noia, to handle the cases such as the present one. Their analysis was based on a solid doctrinal foundation in Fay v Noia. Tollett and Davis have left questions unanswered and Davis, particularly has indirectly cast doubt on the applicability of Fay v Noia. The Fifth Circuit has here reflexively and without thought adopted and applied the Davis waiver standard to a case where no waiver question should even be involved. The Fourth and Sixth circuits have responded more carefully and have reached opposite conclusions on cases identical to the instant one. The courts of the Fourth circuit have further indicated a different approach in those cases where the waiver issue was properly preserved in state court and have suggested that unlike the Fifth Circuit they will continue to apply the waiver rule of Fay v Noia to jury exclusion cases.

The competing considerations underlying Davis on the one hand and Fay v Noia and its offspring on the other are thoroughly familiar to this court and do not need repeating here. It is apparent, however, that action by this court is necessary to clarify the rights of state prisoners, particularly those in the Fourth, Fifth and Sixth Circuits, who raise jury exclusion claims in post-trial proceedings. This Court's decisions in Tollett and Davis have resulted in substantial uncertainty in the lower courts and an absence of a clear legal standard with which to appraise jury exclusion claims. Certiorari

should be granted here in order to resolve that uncertainty and to establish a clear standard.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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PROOF OF SERVICE

I, John Wilson Reed, a member of the bar of this Court and counsel for the petitioner John Newman, hereby certify that I have this 2nd day of January, 1975 served the petition for certiorari on the State of Louisiana by mailing, first class postage prepaid, one copy to:

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